

## Fair Political Practices Commission

### Memorandum

To: Chairman Randolph and Commissioners Blair, Downey, Karlan and Knox

From: Galena West, Commission Counsel Legal Division  
Luisa Menchaca, General Counsel

Re: *In re St. Croix* Opinion Request; O-04-226

Date: January 5, 2005

On October 18, 2004, John St. Croix, Executive Director of the Ethics Commission City and County of San Francisco (“S.F. Ethics”), submitted to the Commission a request for advice concerning interpretation of section 1.106 of the San Francisco Campaign and Governmental Conduct Code, which has incorporated the wording of section 85501 of the Political Reform Act (“Act”).<sup>1</sup> On October 25, 2004, S.F. Ethics requested that the advice request be treated as a request for an opinion from the Commission on this subject. Pursuant to regulation 18329, the Executive Director of the Commission issued a letter on October 25, 2004, indicating the opinion request would be granted. This staff memorandum, prepared by staff pursuant to regulation 18322, discusses the issues presented by the opinion request and offers recommendations where appropriate.<sup>2</sup>

### I. INTRODUCTION

In the November 2000 statewide general election, California voters approved Proposition 34, which amended the Act. The statutory changes made by the proposition significantly impacted the duties and responsibilities of statewide and local officials, candidates, filing officers and others. Among the changes made by Proposition 34 is the addition of section 85501 which prohibits the controlled committee of a candidate from making independent expenditures.

Section 85501 has been incorporated into the San Francisco Campaign and Governmental Conduct Code as section 1.106. In addition, San Francisco has adopted a new voting system to elect candidates called Ranked-Choice Voting (“RCV”). RCV applies to the election of the San Francisco Mayor, Sheriff, District Attorney, City

<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109 – 18997, of the California Code of Regulations. All further statutory references are to the Government Code, unless specified otherwise.

<sup>2</sup> This memorandum has been provided to the members of the Commission, the Attorney General, the Franchise Tax Board, the Secretary of State, the opinion’s requestor and others at least two weeks prior to the hearing, pursuant to the Commission’s regulations. (Regulation 18322.) Any interested person may submit memoranda, briefs or other relevant material no later than five days prior to the scheduled hearing. (*Id.*) The requestor also may present oral testimony at the hearing on the request. (*Id.*)

Attorney, Treasurer, Assessor-Recorder, Public Defender, and members of the Board of Supervisors. (San Francisco charter section 13.102(b).) RCV allows the city to elect a candidate by a majority vote without the need for a separate run-off election. Voters will elect these officials by ranking three different candidates in order of preference. The first choice will be placed in the first column, the second choice in the second column and the third choice in the third column. In the initial tally, only the first choice votes are counted. If any candidate receives a majority of the votes, then that candidate is declared the winner. If no candidate receives a majority of the votes, then the candidate who received the fewest number of first choice votes is eliminated and the voters who selected the eliminated candidate as their first choice will have their vote transferred to their second choice. Those votes are then counted and added to the totals for the remaining candidates. Any candidate receiving a majority is declared the winner. If no majority is obtained, then the process of eliminating candidates and transferring votes is repeated until one candidate has a winning majority.

## **II. QUESTIONS PRESENTED**

- 1) Should the Commission interpret section 85501 of the Act as it applies to Ranked-Choice Voting to assist a local jurisdiction in interpreting its identical provision?
- 2) If so, then:
  - a) Does section 85501 of the Act prohibit a candidate from funding and sending (or multiple candidates from funding and sending) a mailing urging voters to rank that candidate in the first-choice position and two other candidates as the second and third choices?
  - b) If three candidates combine their campaign funds to pay for a mailer, how is the cost allocated?

## **III. COMMISSION OPTIONS**

- 1) The Commission may decide to issue an opinion to determine the application of section 85501 to situations created by RCV or may decide that the question does not concern the application of section 85501, but is really one of interpretation of the local ordinance. Staff finds that the issuance of an opinion is the appropriate action to assist in the correct application of section 85501.

Staff proposes the following process:

- Staff will return with the draft opinion in March. Prior to that meeting, the draft opinion is distributed to the Commissioners, the Attorney General, the Franchise Tax Board, the Secretary of State, the person(s) requesting the opinion, and the interested public. The draft opinion must be adopted by the Commission at a public meeting. Adoption requires the concurring votes of at least three Commissioners.

- The opinion is effective upon adoption by the Commission, and must be published within 30 days after adoption. The Commission may shorten or extend the effective date (or any of the other deadlines described in this memorandum), subject to appeal by any interested person to the Commission.
  - Within 14 days after the opinion is adopted, the person(s) submitting the request, any Commissioner, or the Executive Director may petition the Commission to grant a rehearing. That petition must be in writing if it is submitted by the person(s) originally requesting the opinion. If the Commission decides to grant the petition for rehearing, it suspends the opinion pending the outcome of the rehearing.
- 2) If the Commission determines that issuing an opinion is the appropriate action, the Commission must then determine the answers to the above questions. Staff proposes the following responses and lists the argument and analysis regarding each question within this memorandum.
- a) Staff proposes that the Commission conclude that the mailings in question do not meet the criteria of section 85501 because they are not independent expenditures nor prohibited contributions under the statute if the mailings are sent for the purpose of promoting the mailing candidate's own candidacy and not the candidacy of another. In addition, staff proposes that the Commission opine that three candidates are permitted to combine their funds to finance the mailing so long as each pays proportionately for his or her own section of the mailer. Full and adequate consideration must be provided for each section of the mailer.
  - b) Staff proposes that the Commission conclude that the division of the cost of the mailing would be done by calculating a pro-rata share based on the candidate's space in the mailing. For example, the cost would be divided equally in a case where each candidate has equal space on the flyer.

#### **IV. FACTS**

San Francisco has adopted a new voting system to elect candidates for San Francisco Mayor, Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, Public Defender, and members of the Board of Supervisors called Ranked-Choice Voting ("RCV"). (See also Appendix A, "Ranked-Choice Voting Explained" pamphlet.) RCV was used for the first time in the November 2004 election. RCV allows a candidate to be elected by a majority vote without the need for a separate run-off election. Voters will elect these officials by ranking three different candidates in order of preference. The first choice will be placed in the first column, the second choice in the second column and the third choice in the third column. If any candidate receives a majority of the votes, then that candidate is declared the winner. If no candidate receives a majority of the votes, then the candidate who received the fewest number of first choice

votes is eliminated and the voters who selected the eliminated candidate as their first choice will have their votes transferred to their second choice. Those votes are then counted and added to the totals for the remaining candidates. Any candidate receiving a majority is declared the winner. If no majority is obtained, then the process of eliminating candidates and transferring votes is repeated until one candidate has a winning majority.

Candidates wish to send out mailers telling voters for whom to vote in each of the three positions. Candidates wish to send out these mailers both individually and with other candidates in order to defray the costs. The staff of S.F. Ethics has prepared a draft opinion letter concluding that section 1.122 of the San Francisco Campaign and Governmental Conduct Code (“S.F. Code”) permits a candidate to expend campaign funds only when the primary purpose of such expenditures is to support his or her own candidacy or for expenses associated with holding office. (Appendix B.) Under section 1.122 of the S.F. Code, a candidate may not spend his or her campaign funds when the primary purpose of the expenditure is to urge voters to elect another individual to public office.

The prohibition in section 85501 of the Act has been incorporated into the S.F. Code as section 1.106. S.F. Ethics asks whether the Commission would consider any expenditure made by one candidate that urges voters to support that candidate as the first choice and two others for the second and third choices for the RCV system an independent expenditure that supports or opposes another candidate under section 85501.

## V. ANALYSIS

### **QUESTION ONE: Should the Commission Interpret Section 85501 of the Act as it Applies to Ranked-Choice Voting, to Assist a Local Jurisdiction in Interpreting its Identical Provision?**

Whether the Commission should issue an opinion in this case to advise San Francisco regarding the applicability of section 85501 to its RCV system depends on whether the Commission construes the question to be an issue of local or state concern. Proposition 34 added section 85501 to the Act which prohibits the controlled committee of a candidate from making independent expenditures. Section 85501 provides as follows:

“A controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates.”

Section 85501 is applicable to both state and local candidates and committees since the definitions of both “committee” and “candidate” do not exclude local committees or

candidates through an exception or through the wording of each definition.<sup>3</sup> (Sections 82007 and 82013.) The prohibition in section 85501 is incorporated in the S.F. Code as section 1.106. Since the two sections are identical, a conflict of the two laws is not at issue (See e.g., *In re Pelham* (2001) 15 FPPC Ops. 1); however, different interpretations of the two laws could cause them to conflict through their applications.

For instance, if the Commission determined that section 85501 would prohibit Candidate A's mailer ranking himself and two other candidates, but the local interpretation of section 1.106 allowed this activity, then a conflict through the interpretation of the laws would exist. These dual interpretations would then need to be examined to determine jurisdiction over this activity. This process of examining local rules that are dissimilar to the Act to determine if a conflict exists was followed in the *Pelham* opinion. (*In re Pelham, supra.*) In that case, two Los Angeles ordinances were in question for their possible conflict with the Act.

The Commission determined that although the Los Angeles requirements were different from the requirements found in the Act, they did not impede compliance with the Act's requirements found in section 85700 regarding donor information or the establishment of legal defense funds. As a result, in the case of the Los Angeles ordinances, although dissimilar from the rules contained within the Act, they did not conflict with the Act and were permitted. The two sets of rules were able to coexist without interference. In the instant case, since the rules are identical, this would also be the result. It is only if the local ordinance is interpreted so that it allows behavior prohibited by the Act that a problem could arise since the statute regulates the behavior of both the state and local candidates and their candidate controlled committees.

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<sup>3</sup> Section 82007 states in pertinent part that:

“‘Candidate’ means an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time.”

This definition goes on to exclude federal candidates. Section 82013 states that a:

“‘Committee’ means any person or combination of persons who directly or indirectly does any of the following:

- (a) Receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year.
- (b) Makes independent expenditures totaling one thousand dollars (\$1,000) or more in a calendar year; or
- (c) Makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees....”

**OPTION 1 – Deny the Opinion Request Since the Ordinance Should be Interpreted at the Local Level.**

On the one hand, this issue may be one of local concern if the Commission extends its interpretation of section 85501 to apply to the interpretation of the identical language of section 1.106. As a charter city, San Francisco has home rule powers and plenary authority over the manner of conducting its own elections. Cal. Const., art. XI, § 5.<sup>4</sup> If a subject of local legislation is a “municipal affair,” state law may not interfere with its administration unless the state can show that there is a genuine conflict with state law and that there is an interest of statewide concern which overrides the city’s municipal interests. There is no conflict of law here facially, and the only possible conflict lies through the interpretation of the language of the ordinance and the statute. However, the Commission would not be interpreting the local ordinance in the opinion, but would be interpreting a section of the Act, so the “home rule” authority of San Francisco would remain intact with regard to the interpretation of the local ordinance.

**OPTION 2 – Issue an Opinion to Interpret the State Statute.**

As discussed above, compliance with the Act appears unimpeded since the San Francisco ordinance mimics section 85501; however, the application of the local law could impact interpretation of state law by defining the terms found within the statute and the ordinance, therefore affecting the interpretation of section 85501. The definitions of “independent expenditure”<sup>5</sup> and the phrase “supporting or opposing other candidates” are issues of concern to the Commission and its enforcement of the Act. In addition, the Commission would be interpreting section 85501 as it applies to the RCV, and not interpreting the identical local ordinance so the conflict of law issues do not apply in this case.

Many court cases have discussed the tug of war between local and state laws. In the *County of Santa Barbara v. Kathleen Connell* (1999) 72 Cal. App. 4<sup>th</sup> 175, Santa Barbara challenged the State Controller’s interpretation of Government Code section 68085(d) when the county interpreted its local ordinance as conflicting with the state law.

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<sup>4</sup> Article XI, § 5 of the California Constitution grants charter cities home rule authority. Section 5(a) provides that a charter city “may make and enforce all ordinances and regulations in respect to municipal affairs” and that “with respect to municipal affairs [local laws] shall supersede all laws inconsistent therewith.” Section 5(b) lists several “core” municipal affairs, including “conduct of city elections” and grants charter cities “plenary authority...subject only to restrictions of this article, to provide...the manner in which, the method by which, the times at which, and the terms for which the several municipal officers...shall be elected...”

<sup>5</sup> Section 82031 defines “independent expenditure” as:

“...an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.”

See also regulation 18225.

The court found that the county could not interpret its own ordinance granting itself a higher portion of collected civil filing fees than the state law prescribed, ignoring the Controller's interpretation of the statute. Similarly, S.F. code section 1.106 duplicates the requirements of section 85501 where state law regulates both local and state candidates; therefore, an interpretation of section 85501 as applied to the RCV is appropriate. This would provide guidance as to the application of the local ordinance as well.

Since section 85501 is a part of the Act and applies to both state and local candidates and committees, the Commission should interpret its application to the RCV system. However, it should be made clear that while the Commission will be issuing a binding interpretation of the application of section 85501, it is not dictating how the identical local provision must be interpreted; only suggesting an interpretation in accordance with the Act.<sup>6</sup> S.F. Ethics remains responsible for the interpretation and enforcement of the local rules while the Commission retains jurisdiction over the state statute and its interpretation and enforcement. This becomes an important distinction in the case where the Commission determines that the activity is permissible under the Act but S.F. Ethics determines that it is not permissible under the local ordinance. The Commission would not enforce the local ordinance but San Francisco could as an additional requirement that is not in conflict with the Act.

## **RECOMMENDATION**

Staff recommends that the Commission issue an opinion interpreting the provisions of section 85501 as they apply to RCV. (Option 2.) Staff also feels that an opinion is the appropriate method for answering these questions since San Francisco has chosen to use RCV for many of its elected offices, including Mayor, Public Defender, and the Board of Supervisors. However, it should be noted that the Commission is only providing advice regarding the general scenarios presented and cannot answer in this opinion every factual variation concerning Ranked-Choice Voting. The general guidelines provided herein should be applied to each specific factual circumstance as it arises.

### **QUESTION TWO: Does Section 85501 of the Act Prohibit a Candidate from Funding and Sending (or Multiple Candidates from Funding and Sending) a Mailing Urging Voters to Rank that Candidate in the First-choice Position and two other Candidates as the Second and Third Choices?**

As stated above, section 85501 provides as follows:

“A controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates.”

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<sup>6</sup> In addition, the Commission would not be making a determination of the personal obligations under every factual scenario. Each situation's facts must be analyzed independently to determine the applicability of section 85501.

To examine this section as it applies to RCV, we will look at the elements of the statutory language. The statute can be broken down into three main criteria: (1) a controlled committee of a candidate, (2) an independent expenditure, and (3) the purpose of supporting or opposing other candidates. In order for section 85501 to apply, all three elements must exist. Whether these elements are met in a particular case is a question of fact.

*Controlled committee of a candidate:* The first element is that the statute applies only to controlled committees of candidates. In this case, we are asked about candidates sending mailers, so this element is present.

*An independent expenditure:* Next, we must determine whether the mailing would constitute an independent expenditure. As provided earlier, an independent expenditure is defined in section 82031 as:

“...an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.”

The general rule is that when an expenditure is coordinated, it is made at the behest of another candidate and; therefore, is not an independent expenditure. (See section 85500 and regulations 18225.7 and 18550.1.)

*The purpose of supporting or opposing other candidates:* The third element is the focus of the prohibition. Candidates cannot use their own campaign funds for the primary purpose of getting someone else elected into office.

RCV mailings can produce many possible scenarios as proposed in the facts of the opinion request. These include:

- (1) The mailing is done independently by one candidate for a race in which there is one winner.
- (2) The mailing is done independently by one candidate for a race in which there is more than one winner.
- (3) The mailing is coordinated between the candidates included in the mailing for a race in which there is one winner.
- (4) The mailing is coordinated between the candidates included in the mailing for a race in which there is more than one winner.



## **Scenarios 1 and 2**

Under the second two scenarios, section 85501 would not apply, because the expenditures would be coordinated and thus would not fall under section 85501. However, the first two scenarios do involve independent activity. The Commission must determine whether this independent activity falls under section 85501. Staff has presented two options for the Commission's consideration.

### **OPTION 1 – Allow the Mailings Done Independently Based on Prior Advice that the Mailings Promote the Candidate's Own Candidacy.**

In the first two scenarios, where one candidate is sending the mailing independently, a literal reading of the statute would indicate that the mailing would be an independent expenditure since the mailing "unambiguously urges a particular result in an election" (section 82031) (i.e., Candidate A-first, Candidate B-second and Candidate C-third). However, a rationale has been applied in past advice in similar contexts to reach a contrary conclusion.

For instance, in June of 1986, in a staff memorandum regarding the interpretations of sections 82015 and 82031, candidate-to-candidate endorsements were discussed. The memorandum stated:

"When a candidate includes in his or her literature an endorsement of another candidate or a measure, and it is not done at the behest of the other candidate or measure committee, the candidate sending the mailing is not required to report the expenditure as an 'independent expenditure,' unless the literature is sent to or provided to voters in a jurisdiction in which the candidate sending the mailing is not being voted upon.

"This is based on the assumption that when the mailer is distributed in the candidate's jurisdiction, he/she has included other candidates or measures only for his/her own benefit. When the mailer is sent to another jurisdiction it is assumed that it is done to benefit the included candidates or measures."

This rationale has been restated in the state and local campaign manuals which provide that no independent expenditure is made when a candidate pays for a communication under the following circumstances:

- (1) The mailing supports another candidate;
- (2) It is not made at the behest of the endorsed candidate;

- (3) The mailing includes the candidate who is paying for the communication;
- (4) The mailing is targeted only to the potential voters in the paying candidate's district; and
- (5) The non-paying candidate is listed on the same ballot as the paying candidate. (State Candidate Campaign Manual, pg. 4-4.)

For example, Candidate Fred sends a mailer stating that he supports the Governor and his agenda so people who support the Governor's reelection should also support Fred's candidacy. The mailing is not made at the behest of the Governor and is sent only to the Fred's district. Under the current advice, no independent expenditure has been made by Candidate Fred since all of the criteria are met.

This rationale has also been relied upon in analyzing the definition of a "slate mailer." The definition of a "slate mailer" includes any mass mailings which support or oppose a total of four or more candidates. (Section 82048.3.) In *L.A. Taxpayers Alliance vs. FPFC* (1993) 14 Cal. App.4<sup>th</sup> 1214, an organization sent mass mailers in which the organization promoted three candidates running for three separate offices and advocated the defeat of one of the candidate's opponents. The court determined that the mailing was not a slate mailer because the opponents of candidates supported in a mass mailing were not to be included in the count towards the definition of slate mailer. The court found that when endorsing one candidate, that candidate's opponent is necessarily being opposed whether the opponent was mentioned expressly or by implication. (*Id.* at p. 1220.)

On the other hand, the past advice discussed above has never been applied to the type of election used in San Francisco. An application of the past advice appears to suggest that a candidate could send a mailing urging his or her own election and the election of others if the mailer meets all of the criteria listed.

Another way the Commission could allow the mailing would be to determine that section 85501 is not applicable for these specific elections using RCV. To do this, the Commission could characterize these types of mailings promoting the mailing candidate's own candidacy. For instance, if Candidate A knows that Candidate B is his strongest competition, he may send out mailers suggesting that the ranking for the top three be: 1) Candidate A; 2) Candidate C; and 3) Candidate D. This would be the same whether the election is for a single seat or multiple seats. These mailings are unique to the RCV system jurisdiction since the campaign strategy is to not only receive all the first choice votes but also the second and third choice votes as well.

The Commission could conclude that if Candidate A is using the mailing as a strategy to promote his/her own candidacy, section 85501 would be inapplicable since the mailing would not be for the purpose of promoting the other candidates, but rather his or her own candidacy and would therefore not meet the third criterion of section 85501.

However, if the purpose of the expenditure for the mailing was to support or oppose the other candidates in the mailing, then section 85501 would apply and the mailing would be prohibited because an independent expenditure would result.

This interpretation of section 85501 is feasible since the statute, as written, is ambiguous in its application to RCV. Although the language appears clear and unambiguous on its face, when applying this language to the intricate new voting system, it seems to come to an absurd conclusion unless campaign strategy is taken into consideration. Since the purpose of the RCV system is to eliminate run-offs and create majority winners in the first instance, the rankings of second and third become positions a candidate covets if the first ranking is already taken. Section 85501 was not written to contemplate that situation.

### **OPTION 2 – Prohibit the Mailings as Independent Expenditures and Supporting Another Candidate.**

In contrast, a plain reading of the statutory definition of “independent expenditure” would seem to include this situation within its definition so long as no coordination exists. If this is the case, the situation would be prohibited by section 85501. However, this interpretation of section 85501 has never, to our knowledge, been applied by the Commission.

### **RECOMMENDATION FOR SCENARIOS 1 AND 2**

Staff proposes that the Commission choose Option 1 and interpret the language of section 85501 so as to determine that when a candidate sends a mailing ranking other candidates for the purpose of promoting his or her own candidacy in RCV elections, the mailing is not prohibited by section 85501 of the Act.

### **Scenarios 3 and 4**

As discussed above, where the mailing would be coordinated by the three candidates, the mailing would not qualify as an independent expenditure by any of the candidates since it is a coordinated effort and not independent. In those scenarios, section 85501 would be inapplicable since the second criteria would not be met. However, mailings where Candidates A and B coordinate and include a ranking of Candidate C could still be independent expenditures with regard to Candidate C since he or she did not coordinate the mailing. The analysis for scenarios 1 and 2 would then be applied to test the applicability of section 85501.<sup>7</sup>

Where the mailing would be coordinated by the three candidates and paid for by only one, the mailings could be considered to be a contribution from the candidate who paid for the mailing to the other two candidates included in the mailing. The term “contribution” is defined in the Act and Commission regulations as any payment received

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<sup>7</sup> In addition, it should be noted that the standards found in section 85500 would apply to all state candidates to determine when an expenditure is also a contribution.

by--or made at the behest of<sup>8</sup>--a candidate unless the candidate provides equal or greater consideration for the payment or the payment is for personal purposes unrelated to his or her candidacy or status as an officeholder. (Section 82015; regulation 18215.) The term “expenditure” is defined in the Act and Commission regulations as any payment made by a candidate unless the payment is for personal purposes unrelated to his or her candidacy or status as an officeholder. (Section 82025; regulation 18225.) A candidate who makes a payment to rank another candidate in his own mailing is making a reportable expenditure in the form of a contribution to the other candidate if the expenditure is made at the behest of (in coordination with) the candidate included in the mailing unless an exception applies.<sup>9</sup> Thus, expenditures made at the behest of a candidate or committee are reportable as contributions.

By contrast, if the three candidates split the cost of the mailer proportionately, then no contribution would result. In order for there to be no contribution, each candidate would have to pay full and adequate consideration for his or her portion of the mailer. For example, the Act does not prohibit candidates from sharing the cost of renting a booth at a street fair farmers market. The payments are reportable expenditures and the cost must be proportionately divided among the candidates so that the candidates are not deemed to be making contributions to each other for the remaining cost of the booth. (*Wieser* Advice Letter, No. I-92-560.)

### **RECOMMENDATION FOR SCENARIOS 3 AND 4**

Staff proposes that the Commission determine that coordinated expenditures do not fall within the scope of section 85501 unless an uninvolved candidate is also included in the mailer and that candidates may jointly send out mailers determining rankings for RCV.

### **QUESTION THREE: If Three Candidates Combine Campaign Funds to Pay for a Mailer, How is the Cost Allocated?**

One method currently used to allocate costs is the standard for valuing nonmonetary contributions. This standard is “[w]henever the amount of goods, services, facilities, or anything of value other than money is required to be reported under this title, the amount reported shall be the fair market value....” (Section 82025.5.) The Commission has interpreted this to mean the amount that would have to be paid by the candidate or committee to acquire similar goods or services on the open market. This standard can be used to assist in determining when a candidate is paying his or her equal share of the mailing to determine when no contribution has been made.

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<sup>8</sup> “Made at the behest of” means a payment made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, or at the request or suggestion of a candidate, controlled committee, official committee of a political party, or organization formed or existing primarily for political purposes. (Regulation 18225.7.)

<sup>9</sup> To determine if an expenditure is “made at the behest of” a candidate, the standards of regulation 18225.7 must be applied.

The method for ascertaining the value of the nonmonetary contributions received by candidates when an organization sends out a mailer is as follows:<sup>10</sup>

- (1) Divide the total cost of producing the mailer by the number produced.
- (2) Multiply that figure by the number of mailers sent on behalf of that candidate or measure.
- (3) Calculate the prorated cost of the amount of space allotted to each candidate supported or opposed in the mailer.

Thus, if you produced 1,000 mailers at a total cost of \$2,400, but only 450 mailers were sent in candidate A's district, you would divide \$2,400 by 1,000 and multiply that figure by 450. This would mean that a total of \$1,080 is attributable to that candidate. However, if all the mailers were sent in that candidate's district, the total amount of \$2,400 would be attributable to that candidate.

#### **OPTION 1 – Prorated on the Basis of Space.**

The cost attributable to each candidate is calculated on a pro-rata basis. If there were 13 candidates on the mailer, then the total cost would be divided by the number of candidates (\$2,400 divided by 13). This assumes that each candidate has equal space on the flyer and that all mailers were sent to the candidate's district. That is the amount of the contribution to each candidate or the amount each candidate would pay as his or her portion of the cost to avoid a contribution being generated.

#### **OPTION 2 – Prorated on the Basis of Space and Position Ranking.**

The cost attributable to each candidate is calculated on a pro-rata basis; however, the Commission could determine a new method of calculation for the price of the mailer based on the ranking each candidate is given. For instance, vote for Candidate A first, Candidate B second and Candidate C third. Candidate A would pay a larger amount, perhaps 45% of the mailer's cost, then the other two would pay less so that each is paying full and adequate consideration for the mailing. A way to avoid this prorating would be to send out 1/3 of the mailers with Candidate A in the number one position, 1/3 with Candidate B in the number one position, and 1/3 with Candidate C in the number one position.

#### **RECOMMENDATION**

Staff recommends that the Commission continue to use the space allocation method alone to avoid confusion and for ease of application. (Option 1.)

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<sup>10</sup> This is the same method used to determine what the amount would be if a candidate would like to make a full and adequate payment for his or her portion of the mailer with multiple candidates so that no contribution results and the mailer contains multiple candidates.

## **VI. CONCLUSION**

The Commission may decide to issue an opinion determining the application of section 85501 to situations created by RCV or may decide that the issue is an interpretation of the local ordinance and not an interpretation of the Act. Staff finds that the issuance of an opinion is the appropriate action to assist in the correct application of section 85501.

If the Commission determines that issuing an opinion is the appropriate action, then staff proposes that the mailings do not meet all the criteria of section 85501 if the mailings are done with the purpose of promoting the mailing candidate's own candidacy and not the candidacy of another and that the mailings would only be contributions if coordination was present between the candidates. In addition, staff proposes that the three candidates be permitted to combine their funds to finance the mailing so long as each paid equally for their own section of the mailer. This division of the mailing would be done by calculating the amount of space and distribution provided for each candidate on the mailer.

Attachments:

**Appendix A:** “Ranked-Choice Voting Explained” pamphlet.

**Appendix B:** San Francisco Ethics draft opinion letter.

**Appendix C:** San Francisco Ethics Request for Formal Advice and a Commission Opinion.